IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-419

HOUSTON BELT & TERMINAL RAILWAY COMPANY,

Appellant,

v.

JOE W. WHERRY,

Appellee.

ON APPEAL FROM THE TEXAS COURT OF CIVIL APPEALS,
FIRST SUPREME JUDICIAL DISTRICT

RESPONSE TO APPELLEE'S "REPLY TO JURISDICTIONAL STATEMENT"

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November, 1977

FIDELITY PRINTING COMPANY, HOUSTON

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INTRODUCTORY STATEMENT

Appellee does not deny that the questions presented are substantial. Rather appellee's Reply to Jurisdictional Statement attempts to submerge this appeal in a sea of state procedural rules. While appellant is confident it has complied with all applicable state rules in asserting its federal rights, this Court need not untangle or resolve fine questions of Texas special issue practice in order to determine that the federal questions are properly presented. Even if there had been a waiver under a state procedural rule of general applicability, such a waiver would not prevent

review in this Court, because appellant has asserted its rights below plainly and reasonably at every opportunity. "[T]he assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler,* 263 U.S. 22, 24 (1923).

By this Response, appellant seeks to dispell any doubt or confusion which may have been created as to whether and how the federal questions were raised below.

THE FEDERAL QUESTIONS WERE PROPERLY RAISED IN THE COURTS BELOW

1. *Failure to submit fault issue.* Appellee states at page 7 of his Reply to Jurisdictional Statement, "This case was tried and decided on the issue of actual malice . . ." and cites *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). This statement is plainly in error. Common-law malice was submitted to the jury (Jurisdictional Statement, A-3), but "actual malice" in the *New York Times* sense of knowing or reckless falsity was not. Nor was negligence or gross negligence or any other standard of truth-related fault submitted. The jury found ill will, but not want of care in relation to truth or falsity.

By confusing common-law malice and "actual malice", appellee follows the error of the Texas Court of Civil Appeals below. Common-law malice is not a truth-related fault standard, and it certainly is not a shade or variation of "actual malice." In *Beckley Newspapers Corp* v. *Hanks,* 389 U.S. 81 (1967), the trial court instructed the jury that it could find for the plaintiff if defendant had published certain editorials with "bad or corrupt motive" or "from personal spite, ill will, or a desire to injure plaintiff." 389 U.S. at 82. This Court termed this instruction "clearly impermissible" under the *New York Times* standard *Id* In *Letter Carriers* v. *Austin,* 418 U.S. 264 (1974), the Court

considered a malice instruction strikingly similar to that used by the trial court in this case:

> The term "actual malice" is that conduct which shows in fact that at the time the words were printed they were actuated by some sinister or corrupt motive such as hatred, personal spite, ill will, or desire to injure plaintiff; or that the communication was made with such gross indifference and recklessness as to amount to a wanton or willful disregard of the rights of the plaintiff.

418 U.S. at 269. This Court rejected this charge as a "fundamental misreading" of the applicable "actual malice" fault standard. Common-law malice cannot serve as a substitute for "actual malice" any more than it can serve as a substitute for negligence.

Appellant does not complain on this appeal of an improper definition of common-law malice, or of any failure to define common-law malice, as suggested in appellee's Reply. Appellant complains rather that the trial court *failed to submit a negligence issue,* or any other constitutionally permissible fault issue. Objection was made at the trial level at the proper time, repeatedly and with clarity and with specific citation to this Court's *Gertz* opinion. Appellant submits therefore that the question of whether the trial court erred in refusing to submit a fault issue to the jury is properly before this Court.

2. *Failure to require proof of "actual damages."* Appellee argues that an award of presumed damages was permissible because "actual malice" was found. The premise of this argument is faulty. Actual malice was not found. The conclusion therefore does not follow. The Texas Court of Civil Appeals expressly relied upon the "presumed damages" doctrine. (Jurisdictional Statement, B-19). It *had* to rely on presumed damages, because there was no

evidence of actual damages. While there was some evidence that appellee had difficulty getting jobs, there was no evidence that the difficulty resulted from any statement by defendant, rather than some other cause, such as, for example, his Undesirable Discharge from the U. S. Army. (S.F. 186). In the absence of any evidence of actual damages, the permissibility of presumed damages in a libel action against a non-media defendant is properly before this Court.

3. *Submitting Public Law Board Award to jury.* Appellee misinterprets appellant's complaint concerning the Public Law Board Award as an objection to the admission of the Award into evidence. (Reply to Jurisdictional Statement at 11). Appellant's complaint is not directed at the admission of the Award into evidence, but to the charge of the trial court to the jury, which permitted the jury to find that the Award was a libel by the railroad, notwithstanding a pleaded defense of absolute privilege under the Railway Labor Act. Since appellant's objection goes to the form of Special Issue No. 1, and does not raise failure to define or explain some term in the charge, the portion of Rule 279 of the Texas Rules of Civil Procedure cited by appellee at pages 11 and 12 of his Reply to Jurisdictional Statement is wholly inapplicable. It is unquestioned that appellant's objection to the form of the issue was made with the requisite clarity, as required by Rule 274 of the Texas Rules of Civil Procedure. There was therefore no waiver of this question by appellant, and it is properly presented for review on this appeal.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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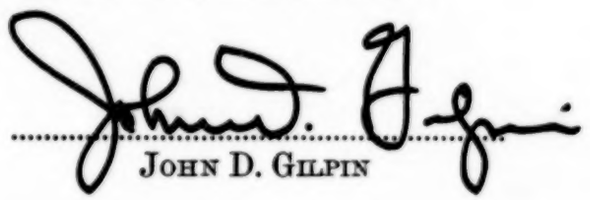
CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 1977, three copies of this Response to Appellee's "Reply to Jurisdictional Statement" were mailed by first class mail, postage prepaid, to George Pletcher, Esq., Helm, Pletcher, Hogan & Burrow, 2800 Two Houston Center, Houston, Texas 77002, counsel for appellee. I further certify that all parties required to be served have been served.



JOHN D. GILPIN